IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1577

JOSEPH A. BRODERICK,
Petitioner,
v.
CATHOLIC UNIVERSITY OF AMERICA,
Respondent.

No. 75-1647

DAVID J.K. GRANFIELD,
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v.
CATHOLIC UNIVERSITY OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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July 2, 1976

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether the practice of Catholic University, a private, religiously related institution, in paying clerical members of its faculty on a lower salary scale than that applicable to its lay faculty is, simply by virtue of the University's receipt of federal funds, governmental action violating the Establishment Clause or Free Exercise Clause of the First Amendment.

STATEMENT OF THE CASE

The respondent, the Catholic University of America, is a private, church-related institution of higher education, located in Washington, D.C. Its Board of Trustees consists of 30 persons, 15 of whom are clerics (including five Cardinals) (A 16 n. 19).[1] The Archbishop of Washington is *ex officio* the Chancellor of the University (*id.*). Three of its schools are under the direction of the Holy See (*id.*). No representative of the federal government is in any way involved in the direction, supervision, or control of any affairs of the University (T. 480, 497).

The University derives approximately 43 percent of its annual revenues from student and tuition fees, and 20 percent from gifts and grants, primarily acquired through diocesan collections conducted by bishops throughout the country (A 16 n. 19; Ex. 1d, T. 501-02). Approximately 25 percent of its revenues come from the federal government (A 17 n. 21, B 14 n. 33). These funds are essentially of two types: funds for research programs resulting in no profit to the University and wholly free from governmental participation; and funds for tuition aid to students (Ex. 1d; T. 495-96). The statutes under which the University receives these funds specifically prohibit the Government from exercising "any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel" of the University. 20 U.S.C. § 1232a. The remainder of the University's revenues come from miscellaneous nongovernmental sources (Ex. 1d). The University does not keep separate accounts for its various schools, and the federal funds it receives go into its general account (A 18).

The University has historically maintained a practice of paying the clerical members of its faculty on a lower salary scale than that followed for its lay faculty members. This practice was deliberately chosen by the bishops as a form of financial support for the University, and was in accord with a tradition whereby Catholic colleges have generally expected some sacrifice from their faculty members, particularly the clerical members (A 3). The practice was also intended to prevent competition, for financial reasons, among the diocesan clergy for appointments to Catholic University, and to deter those who had been appointed from declining to return to work in their home dioceses if needed (A 3 n. 3). Beginning in 1945, efforts were made to put the salaries of the University's clerical faculty members on a parity with salaries of lay members (A 4); and in 1968 the Board of Trustees affirmed the principle of parity as a "goal" to be achieved "eventually" (A 5). In 1970, because of the straitened financial condition of the University, the Board determined that it could not achieve the goal of parity at that time; and hence the University continued to pay its

[1] Throughout this brief, citations to "A—" refer to the opinion of the Court of Appeals, reprinted as Appendix A to each of the petitions for certiorari (and numbered identically in both). Citations to "B—" refer to the District Court's opinion, reprinted as Appendix B to each petition for certiorari. Citations to "Brod. Pet. ——" and "Gran. Pet. ——" refer to petitioner Broderick's petition and petitioner Granfield's petition, respectively. Finally, citations to "T. ——" refer to the transcript of the trial, and citations to "Ex. ——" refer to exhibits in the record.

clerical faculty on the lower, "clerical scale" (A 7, T. 528-39).[2]

Both the petitioners were, at the times relevant to this case, tenured professors at the University's law school. Both are also Catholic priests and members of religious orders, and as such were subject to the University's clerical salary scale.[3] In July 1971, the petitioners brought separate actions against the University in the United States District Court for the District of Columbia, seeking to have the clerical scale set aside as applied to them. They alleged first that they were entitled, as a matter of promissory estoppel, contract, and property right, to a salary on the same basis as that applied to lay faculty members. They also alleged that the University's policy of paying clerics on a lower scale violated the Establishment Clause and the Free Exercise Clause of the First Amendment and other provisions of the Constitution.

After a consolidated trial, the District Court entered judgment for the University. It rejected the petitioners' nonconstitutional allegations on essentially factual grounds (B 6-13); and it rejected their constitutional claims on the ground that the University's policy in question did not constitute "governmental action" and

[2] Since that time, however, Catholic University has pursued its "goal" of parity; and indeed, at the present time, it has brought the salaries of all its clerical faculty up to the minimum for University professors. Although this does not yet mean that each priest-professor receives the same salary as he would if he were a lay person, it shows that the University is approaching the goal of complete parity.

[3] Petitioner Broderick has now resigned from the faculty of Catholic University, effective in August 1976. Petitioner Granfield, who remains at the University, has had his salary brought up to the minimum for University professors (see note 2, *supra*); and the Provost of the University has instructed the law school to raise his salary further, in periodic increments, until it is on full parity with the salaries of lay faculty at the law school.

was thus not subject to constitutional restraints (B 13-15).

On appeal, petitioner Granfield's primary constitutional contention was that, because of the federal funds provided to the University, its clerical salary scale was attributable to the Government, and that that scale, by imposing a burden on the petitioner because of his clerical status, violated his rights under the Free Exercise Clause. In this connection, Granfield argued that the test for attribution required less governmental participation than usual, because the Government's continued financial aid to the University, while the latter maintained the clerical scale, violated the Establishment Clause.[4] Petitioner Broderick argued, *inter alia*, that because the federal funds received by the University went into its general account out of which faculty salaries were paid, the University's clerical scale was "governmental action"; that that action violated his free-exercise rights by discriminating against him on account of his religious status; and that the clerical scale, by involving the use of federal funds in order to promote a religious interest, constituted an establishment of religion. In connection with his Establishment Clause argument, Broderick relied exclusively on cases challenging the *Government's* provision of aid to religiously related schools, rather than challenging a particular policy of such a school itself.[5]

The Court of Appeals affirmed the District Court's decision. It rejected the petitioners' Establishment Clause claims, stating that the petitioners had failed to seek injunctive relief against continued governmental aid to the University, but had attacked only one specific practice at the University (A 17-18). The court thus held that

[4] See Father Granfield's principal brief in the court below, pp. 32-35, 38-41, and his reply brief, pp. 17-19.

[5] See Father Broderick's principal brief in the court below, pp. 43-51, and his reply brief, pp. 10-12, 14-15.

there was no genuine dispute as to whether continued governmental aid to the University violated the Establishment Clause, and that that issue was therefore nonjusticiable by the court (A 19-20). It is understandable that the Court of Appeals rested its decision regarding the establishment claims primarily on this ground, when one considers the confusion in the petitioners' briefs in that court, particularly Father Granfield's, as to whether their Establishment Clause challenges were to the Government's aid to the University or to the University's own policy. The court did state, however, that to the extent that the petitioners challenged the University's clerical scale as governmental action establishing religion, that challenge was without substance because the clerical scale was an internal religious matter in which the Government was not involved (A 21 n. 27).

The court also rejected the petitioners' free-exercise claims. It stated first that while it had previously found no governmental action in the conduct of Catholic University,[6] it did not have to reach the question whether governmental action should be found more readily in this case, where a free-exercise violation was asserted, as it is in cases involving alleged racial discrimination (A 22-23). The court held that a private institution charged with infringement of religious freedom is subject to First Amendment restraints only where the Government is significantly involved in the alleged infringement (A 23). In the present case, the court said, the clerical scale was simply an internal religious matter whereby one arm of a particular church was charged with discrimination against certain members of that church's own religious orders (A 23-25). Hence, the court concluded that there was no private infringement of religious freedom to impute to the Government and therefore no violation of the Free Exercise Clause (A 25).

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[6] *Spark* v. *Catholic University*, 510 F.2d 1277 (D.C. Cir. 1975).

ARGUMENT

The primary contention of both petitioners here is that the court below erred in holding their Establishment Clause claims nonjusticiable on the ground of a lack of genuine dispute as to the validity under that Clause of the Government's financial aid to the University. According to the petitioners, a private suit against a church-related university receiving federal funds, brought by a faculty member (even a co-religionist one) and challenging the university's expenditure of such funds in a way that promotes a religious interest, is a proper and desirable way to ensure enforcement of the Establishment Clause prohibition against governmental action promoting religion. The petitioners also argue that the Court of Appeals erred in rejecting their establishment and free-exercise contentions on the ground that the University's clerical scale was an internal religious matter. In their view, that holding would allow a church-related university receiving federal funds to defeat the First Amendment claims of its co-religionist faculty members simply by asserting that there is a religious reason for the challenged policy.

As the petitioners now appear to admit, the court below correctly decided that, to the extent they attacked the Government's provision of funds to a church-related university, their action was required to be brought against the Government itself. The petitioners did not sue the Government in the present case, and they now concede that they are not in any way challenging the federal aid to Catholic University (Brod. Pet. 10, Gran. Pet. 13-14). Hence, the petitioners' arguments, however phrased, must be that the *University* violated the Establishment and Free Exercise Clauses by its use of the clerical scale. Obviously, since only the Government is bound by the First Amendment, the petitioners could not prevail unless the University's adoption and implementa-

tion of the clerical scale are attributable to the Government. However intricate and convoluted the petitioners' arguments to this Court may be, those arguments would be, and are, completely answered by the fact that Catholic University's challenged practice is not "governmental action." The decision below is fully sustainable on that ground.

Accordingly, we will demonstrate first that, under established principles, and as explicitly found by the District Court, Catholic University's clerical scale is plainly not governmental action. That finding raises no novel or important constitutional issue; it simply requires application to the facts of this case of criteria and standards established by this Court and amplified by the lower courts. Indeed, the petitioners spend very little time in their petitions discussing the application of the governmental-action doctrine in the present circumstances, and they allege no conflict in the circuits on that point (Brod. Pet. 16-17, Gran. Pet. 24-25). Consequently, the decision below, which is wholly sustainable on the ground of a lack of governmental action, does not warrant review by this Court.[7]

In addition, however, we will go on to demonstrate briefly that even if Catholic University's clerical scale were deemed to be governmental action, the petitioners' claims that it violates the Establishment and the Free Exercise Clauses are insubstantial and not deserving of this Court's review.

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[7] It should also be noted that the petitioners' basic grievance in the courts below was that they were denied the parity which the University had agreed to grant them—a claim which they brought primarily as a matter of common-law contract right and promissory estoppel and which they attempted to raise, in addition, as a constitutional question. This Court should not sanction the petitioners' efforts to convert what is essentially a state-law claim into a constitutional claim to be decided in federal court. Cf. *Paul* v. *Davis*, 44 U.S.L.W. 4337 (1976).

I. Under Established Principles, Catholic University's Policy Regarding the Salaries of Its Clerical Faculty Is Not Attributable to the Government, and There Is Thus No Need for This Court's Review.

This Court has made clear that the Constitution does not apply to a private institution simply because the institution "receives any sort of benefit or service at all from the [Government] . . . ." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). Rather, only by "sifting facts and weighing circumstances" can it be determined whether the action of a private institution is attributable to the Government for constitutional purposes. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Nevertheless, this Court has enunciated broad principles to govern the determination whether such governmental action exists, and has identified factors relevant to that inquiry. The lower courts have applied and interpreted those principles and factors in a variety of factual situations.

Under this Court's decisions, governmental action will be found where the Government "has so far insinuated itself into a position of interdependence with [the otherwise private entity] that it must be recognized as a joint participant in the challenged activity . . . ." *Burton*, *supra*, at 725. See also *Moose Lodge*, *supra*, at 172-75; *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 573 (1974); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Evans* v. *Newton*, 382 U.S. 296, 299 (1966); and *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 119 (1973) (opinion of Burger, C.J., joined by Stewart and Rehnquist, J.J.). Thus, in order for the action of a private institution to be deemed governmental action, the Government must be significantly and comprehensively involved in, and interdependent with, the institution, and moreover must be so significantly involved in the institution's specific "challenged activity" as to be a "joint participant" in *that particular*

conduct. This Court emphasized the latter requirement in *Jackson*, where it stated that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." 419 U.S. at 351. A plethora of lower court decisions attests that there must be such a nexus in order for governmental action to be found.[8]

This Court has also indicated that a finding of governmental action may depend on whether the private entity is exercising "powers traditionally exclusively reserved to the [Government]." *Jackson, supra*, 419 U.S. at 352. See also *Evans, supra*, at 301-02; *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

Another factor relevant to the governmental-action determination has been suggested by this Court's decisions and explicitly recognized by numerous lower courts—namely, an evaluation of the offensiveness of the challenged activity as against the value of preserving the private institution free from judicial interference in that activity. The concepts of governmental action developed primarily in the context of racial discrimination, where the test was necessarily made broad because of the particular historical offensiveness of such conduct even in the private sector. See *Norwood* v. *Harrison*, 413 U.S. 455, 469-70 (1973), stating that the Constitution "places

[8] See, *e.g.*, *Golden* v. *Biscayne Bay Yacht Club*, —— F.2d —— (5th Cir. No. 74-1349, April 15, 1976), slip op. at 2921-22; *Greco* v. *Orange Memorial Hospital Corp.*, 513 F.2d 873, 878 (5th Cir.), *cert. den.*, 44 U.S.L.W. 3328 (1975); *Greenya* v. *George Washington University*, 512 F.2d 556, 561 (D.C. Cir.), *cert. den.*, 44 U.S.L.W. 3330 (1975); *Junior Chamber of Commerce of Rochester, Inc.* v. *United States Jaycees*, 495 F.2d 883, 887-88 (10th Cir. 1973), *cert. den.*, 419 U.S. 1026 (1974); *Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756, 761-62 (7th Cir. 1973); *Ward* v. *St. Anthony Hospital*, 476 F.2d 671, 675 (10th Cir. 1973); *Powe* v. *Miles*, 407 F.2d 73, 81 (2d Cir. 1968).

no value on discrimination as it does on values inherent in the Free Exercise Clause." In other areas, however, a greater degree of governmental involvement has been thought necessary in order to meet the governmental-action standard.[9] This is particularly true where there is great value in keeping the private institution free from the constitutional restraints applicable to the Government, and most especially where the private entity itself is asserting its own constitutional right to freedom from governmental interference. See *Columbia Broadcasting System* v. *Democratic National Committee*, *supra*, at 120 (Burger, C.J., joined by Stewart and Rehnquist, J.J.).[10]

The present case raises no new or important question as to the proper standard for determining the presence of governmental action. The determination can be made here by "sifting" and "weighing" the particular facts of this case in light of the above principles. Application of those principles shows clearly that Catholic University's use of the clerical salary scale is not governmental action.

In attempting to raise the governmental-action question, the petitioners rely on the facts that the University receives federal financial aid (approximately 25 percent of its annual revenues), that it places those monies in its general unrestricted funds, and that it pays the salaries of its faculty from such general funds (Brod. Pet.

[9] Cases explicitly recognizing that governmental action is more readily found in racial-discrimination cases than in other cases include *Greco* v. *Orange Memorial Hospital Corp.*, *supra*, at 878 n.9 and 879; *Greenya* v. *George Washington University*, *supra*, at 560; *Jackson* v. *Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974), *cert. den.*, 420 U.S. 927 (1975); and *James* v. *Pinnix*, 495 F.2d 206, 208 (5th Cir. 1974).

[10] See also *Wahba* v. *New York University*, 492 F.2d 96, 102 (2d Cir.), *cert. den.*, 419 U.S. 874 (1974); *Bright* v. *Isenbarger*, 314 F.Supp. 1382, 1390-92 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

17; Gran. Pet. 24). These facts, however, are hardly enough to show that Catholic University's practice of paying its clerical faculty less than its lay faculty is attributable to the Government. Where, as here, the Government exercises no influence whatever in the supervision, direction, or control of a private university's academic program, administration, personnel, or any other policy, the Government cannot be said, simply by virtue of its partial funding, to have insinuated itself into or intertwined itself with the university so as to make a specific policy of the university governmental action. The District Court so held (B 13-15), and other decisions to that effect abound.[11] Indeed, this is particularly true here since "the statutes under which the University received the funds specifically prohibit the Federal Government and its agents from exercising any supervision or control over or participating in the activities of the University." *Spark* v. *Catholic University of America*, 510 F.2d 1277, 1282 (D.C. Cir. 1975). See 20 U.S.C. § 1232a.[12]

In any event, there is no nexus between the federal funds granted to Catholic University and the University's

[11] See, *e.g.*, *Spark* v. *Catholic University of America*, 510 F.2d 1277, 1282-83 (D.C. Cir. 1975); *Williams* v. *Howard University*, 528 F.2d 658, 660 (D.C. Cir. 1976); *Greenya* v. *George Washington University*, *supra*, at 560-61; *Wahba* v. *New York University*, *supra*, at 100-02; *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535, 547-48 (S.D. N.Y. 1968). See also *Doe* v. *Bellin Memorial Hospital*, *supra*, at 761; *Ward* v. *St. Anthony Hospital*, *supra*, at 675.

[12] It is also clear, although the petitioners do not raise this contention in their petitions, that Catholic University's congressional charter and its tax exemption are insufficient governmental involvement to make its conduct governmental action. See, *e.g.*, *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518 (1819); *Spark* v. *Catholic University of America*, *supra*, at 1282; *Greenya* v. *George Washington University*, *supra*, at 559-60; *Blackburn* v. *Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971); *Browns* v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Bright* v. *Isenbarger*, *supra*, at 1396-97.

challenged activity (the clerical scale), as required by this Court's decisions. The fact that the federal monies received by the University go into its general fund, from which faculty salaries are paid, is a bank account fortuity and no more. The federal funds are—and must be—granted to the University without any restrictions or directions, much less one involving differential treatment of clerical and lay faculty. The clerical salary practice is a purely private policy adopted by the University completely without governmental participation. It existed before the University received any federal funds and would continue to exist, except as voluntarily modified by the University, whether or not the University received federal money. Thus the Government is wholly uninvolved in the alleged discrimination against the petitioners and cannot be said to have "place[d] its power, property, and prestige behind the [alleged] discrimination." *Burton* v. *Wilmington Parking Authority*, *supra*, at 725. The court below recognized this when it stated that the First Amendment becomes relevant to a private institution "only when a governmental entity is shown to have become significantly involved in the discrimination practiced by it" (A 23), and then found no such governmental involvement in the "internal religious" policy of Catholic University (A 23-25). Because of the lack of a sufficient nexus between the financial aid and the clerical salary scale, the latter is plainly not governmental action.[13]

[13] This conclusion is in accord with other decisions of the lower courts. Thus, for example, in *Spark* v. *Catholic University of America*, *supra*, although federal funds went into the University's general account used to pay faculty salaries, the denial to a university professor of salary increases and his subsequent forced retirement, as alleged punishment for his exercise of free speech, was held not to be governmental action because of the lack of connection between the federal funds and the University's decisions. 510 F.2d at 1282. Similarly, in *Doe* v. *Bellin Memorial Hospital*, *supra*, although the hospital used federal monies to fund other

Moreover, of course, Catholic University plainly does not perform a function traditionally exclusively reserved to the Government, and the petitioners make no contention that it does. Indeed, the cases are consistent in holding that education at a private school is not such a public function.[14]

Finally, we submit that, in determining whether governmental action is present here, it is relevant that this case does not involve any allegation of racial discrimination—an area where the standard has generally been found to be easier to meet. The petitioners suggested in the court below that their allegations of religious discrimination should trigger the same standard as applies in the race context (A 22-23). Like the court below, however, this Court need not reach the question whether that analogy is valid for the typical religious-discrimination case, as held in *Golden* v. *Biscayne Bay Yacht Club*, 521 F.2d 344, 351 (5th Cir. 1975), *rev'd en banc on other grounds*, —— F.2d —— (5th Cir., No. 74-1349, April 15, 1976). The petitioners' claim here is that Catholic University—an arm of the Catholic religion—has discriminated against clerical members of *that same religion*. This hardly could give rise to what the panel opinion in *Golden* called "the same stigma of inferiority and badge of opprobrium that is characteristic of racial discrimination." 521 F.2d at 351.

Furthermore, the clerical salary policy challenged here was adopted for religious reasons (see p. 3, *supra*), and there is great value in preserving the right of a private, religious educational institution to establish religiously

operations, its refusal to perform abortions was held not to be governmental action because of a lack of any governmental involvement in the hospital's abortion policy. 479 F.2d at 761.

[14] See, *e.g.*, *Greenya* v. *George Washington University*, *supra*, at 561 n.10; *Powe* v. *Miles*, *supra*, at 80; *Browns* v. *Mitchell*, *supra*, at 596; *Bright* v. *Isenbarger*, *supra*, at 1397-98; *Grossner* v. *Trustees of Columbia University*, *supra*, at 549.

related policies free from judicial interference based on a bare pretext of governmental action. Indeed, the University itself, to the extent it is a religious institution, has a constitutional right to the free exercise of religion. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952). See also *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 44 U.S.L.W. 4927, 4935 (1976). In such a case, before governmental action can be found, there must be a very strong showing of governmental involvement in the university's religiously related policy, for a finding that such a policy is governmental action entails the result that, to that extent, the university's religious liberty could be impaired. As we have shown, there has been no showing, much less a strong showing, of governmental involvement in Catholic University's clerical salary scale.[15]

II. Even Assuming That the University's Clerical Salary Scale Were Governmental Action, Petitioners' Claims That It Violates the Establishment and Free Exercise Clauses Are Insubstantial.

Although the lack of governmental action in this case is sufficient to sustain the decision below, the petitioners' claims of violation of the Establishment and Free Exercise Clauses are insubstantial in their own right.

1. *The Establishment Claim.* Even assuming the presence of governmental action here, the petitioners' claim that Catholic University's policy of paying *lower* salaries

[15] Petitioner Broderick's additional argument that, under *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the decision below itself constituted governmental action violating the Establishment Clause (Brod. Pet. 17-18) approaches the frivolous. Unlike the situation in *Shelley*, Catholic University has not attempted to have any court enforce its clerical scale; the *petitioners* brought this suit. The upshot of Broderick's contention would be that whenever a court finds no governmental action in the challenged conduct of a private institution, the court's decision itself would supply the requisite governmental action.

to clerics of a particular religion actually constitutes an establishment of that very religion is bizarre at best. The far-fetched nature of this challenge under the Establishment Clause is demonstrated by the fact that it is made by priests of the same religion allegedly being established.[16] Because of the uniqueness of this claim, it has understandably given rise to no conflict in the circuits and presents no issue of general importance for this Court's decision.

In any event, this Court has in some circumstances allowed governmental aid to religion under the Establishment Clause, where the aid was indirect, its purpose was not to promote religion, and a contrary holding could cause a violation of the Free Exercise Clause. See, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (property tax exemption); *Wisconsin* v. *Yoder*, 406 U.S. 205, 220-21 (1972) (exemption from compulsory school attendance requirement); *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963) (exemption from requirement to work on Saturday in order to get unemployment benefits); *Everson* v. *Board of Education*, 330 U.S. 1, 16-18 (1947) (transportation of students). See also *Roemer* v. *Board of Public Works of Maryland*, 44 U.S.L.W. 4939, 4942-43 (1976).[17] In the present situation, even if the University's payment of lower salaries to clerical faculty from a general account that includes federal funds were deemed to be governmental action, the Government's aid

[16] We note that the petitioners have no standing *as taxpayers* to challenge the expenditure of federal funds under the Establishment Clause, since the petitioners, having taken vows of poverty, cannot accumulate property and therefore pay no federal income taxes (T. 133-34, 412).

[17] In *Roemer*, the Court approved Maryland's form of financial aid to private, religiously related colleges even though "[b]udgetary considerations lead the colleges generally to favor members of religious orders, who often receive less than full salary." 44 U.S.L.W. at 4946.

to religion would be indirect at best, for, as demonstrated above, the federal funds relied on to show governmental action have no relationship whatever with the University's decision, adopted without governmental participation, to employ a separate clerical salary scale, and thus are "not aimed at establishing, sponsoring, or supporting religion." *Walz*, *supra*, at 674. On the other hand, again even assuming that the clerical scale were considered as governmental action, the fact remains that Catholic University is not a public institution, but a private, religiously related university with its *own* right to religious freedom; and acceptance of the petitioners' argument would lead to an interference with the University's exercise of that right. In these circumstances, the petitioners' attack on the clerical scale raises no substantial claim under the Establishment Clause.[18]

2. *The Free Exercise Claim.* The University's policy of non-parity for its clerical faculty plainly does not in any way abridge the petitioners' rights to practice the Catholic faith or to function as priests of that faith, nor does it discriminate against them on account of their religion. The petitioners' claim is that that policy discriminates against them on account of their *status* as priests of the Catholic religion. Even if that policy were deemed in some sense to be governmental action, however, it must be remembered that it is a policy adopted by an institution affiliated with the same church with which the petitioners are affiliated. As the court below held, the alleged discrimination by an arm of a particu-

[18] Indeed, the petitioners' thesis presents a constitutional paradox which only a law professor could relish. It would mean that a religiously related university, by receiving federal funds which are themselves *not* prohibited by the Establishment Clause—and the petitioners concededly do not contend that they are so prohibited—would violate the same Establishment Clause by its very continued existence as a religiously related university exercising its freedom to follow religious policies.

lar church against certain of that church's own members is an internal religious matter that "does not involve the sort of restraint which is suspect under the Free Exercise Clause" (A 25).[19] Cf. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, *supra*.

When the petitioners voluntarily became priests, they were well aware that they might be subjected by their church, on account of their status, to certain treatment and restraints to which others would not be subjected. Accordingly, in a situation where governmental action allegedly discriminating against them because of that status is in fact the action of church authorities which is deemed to be governmental action, the petitioners' voluntary acceptance of clerical status constitutes a waiver of their free-exercise rights as against that action. Just as a person may waive constitutional rights as against the action of the Government itself in order to obtain benefits from the Government, so the petitioners waived their free-exercise rights as against the action of church authorities, even when treated as governmental action, in order to obtain benefits from the church.

Moreover, the petitioners, as priests of religious orders, came to Catholic University with the approval of the superiors of their orders, who control their assignments as priests and who were fully aware of the clerical salary policy. Hence, any alleged infringement of their free-exercise rights comes essentially from their choice to become religious-order priests and their vows of obedi-

[19] The internal nature of the petitioners' claim is demonstrated further by the fact that, since petitioners are members of religious orders and have taken vows of poverty, they can acquire no property, and any salary they earn from Catholic University, in excess of what they require for personal needs, goes to their respective religious orders (T. 134, 412). Viewed in this light, the University's clerical salary policy is simply an intra-church arrangement among the bishops, the orders, and the University. Its presence or absence has no economic consequences for the petitioners personally, nor does it impose any stigma upon them.

ence—self-imposed restrictions on their right to practice their religion as they might otherwise see fit.

In sum, even if the University's clerical scale were considered to be governmental action, it nevertheless arose wholly within the context of a particular religion and would not constitute the type of infringement of religious liberty prohibited by the Free Exercise Clause. In the particular circumstances of this case, then, there is no need for this Court's review.

CONCLUSION

For these reasons, we respectfully urge this Court to deny the petitions for certiorari in both of the present cases.

Respectfully submitted,

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July 2, 1976